No. 12623

In The United States

COURT OF APPEALS

For the Ninth Circuit

PACIFIC AMERICAN FISHERIES, INC.,
Appellant,

v.

M. P. MULLANEY, Commissioner of Taxation,
Territory of Alaska,
Appellee.

Upon Appeal from the District Court for the Territory of Alaska, First Division

BRIEF FOR APPELLEE

J. GERALD WILLIAMS
Attorney General of Alaska

JOHN H. DIMOND
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Juneau, Alaska
For Appellee.

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NOTE:

The relevant portions of the principal statutes involved, Act of Mar. 21, 1949, Chapter 66, Session Laws of Alaska, 1949, and Section 8 of the Alaska Organic Act, (Act of Aug. 24, 1912, c. 387, §8, 37 Stat. 514, 48 USCA §76), are set out in Appendix A. The case of *Anderson v. Mullaney*, District Court for Alaska, No. 6102-A, decided March 21, 1950, as yet unreported, is set out in Appendix B.

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BRIEF FOR APPELLEE

OPINION BELOW

The opinion of the district court consists of its two memorandum opinions of August 15 and 16, 1949, (R. 28-30) and the minute order in the journal of June 30, 1950 (R. 37).

JURISDICTION

This is a suit to enjoin the appellee from enforcing the provisions of Chapter 66, Session Laws of Alaska, 1949, so far as they are applicable to nonresident fishermen as that term is defined therein, and to have declared null and void and of no legal effect said Chapter 66 as it applies to the said nonresident fishermen (R. 9-10). Summary judgment for appellee was entered on July 7, 1950, and appellant's complaint was dismissed (R. 38). An appeal was taken on June 14, 1950, by filing with the district court notice of appeal (R. 39). The jurisdiction of the district court was invoked under the Act of June 6, 1900, c. 786, § 4, 31 Stat. 322, as amended, 48 USCA § 101. The jurisdiction of this court rests on § 1291 of Title 28, United States Code Judiciary and Judicial Procedure.

QUESTIONS PRESENTED

1. Whether the record in this case shows that there was no genuine issue as to any material fact.

2. Whether appellee as a matter of law is entitled to a judgment and an order dismissing appellant's complaint.

STATEMENT

This action was instituted by appellant on August 5, 1949, to enjoin the enforcement of the provisions of Chapter 66 ,Session Laws of Alaska, 1949, so far as they are applicable to nonresident fishermen as that

term is defined therein, and to have declared null and void and of no effect said Chapter 66 to the extent that it applies to nonresident fishermen (R. 2-15).

Appellant is engaged in the business of salmon fishing and canning at various places within the Territory of Alaska and has alleged in its complaint that it employees approximately 400 nonresident fishermen in such operations, all of whom are subject to the $50 license tax under the provisions of Chapter 66, Session Laws of Alaska, 1949 (R. 2-3). Believing that this Act of the Territorial Legislature is invalid on various grounds (R. 4), and that irreparable injury would result to its fishing and canning operations if nonresident fishermen whom it employed were obliged to pay the $50.00 license tax (R-5-8), appellant, on August 5, 1949, obtained a temporary restraining order enjoining appellee from enforcing any of the provisions of Chapter 66 applicable to nonresident fishermen, and also obtained an order citing appellee to appear before the district court at a designated time and show cause why a preliminary injunction should not be granted (R. 16-18). On August 17, 1949, the court denied appellant's application for a preliminary injunction (R. 31-32), its reasons for such action being set forth in its two memorandum opinions of August 15 and 16, 1949 (R. 28-31).

Thereafter appellee, on May 8, 1950, filed a motion for judgment on the pleadings (R. 36), and the court treating this as a motion for summary judgment, on July 7, 1950, granted the same and entered an order dismissing appellant's complaint (R. 38). The reason

for this action of the court appears briefly in a minute order entered June 20, 1950 (R. 37). This appeal followed (R. 39).

SUMMARY OF ARGUMENT

I.

A summary judgment may be granted in a suit for a permanent injunction as well as in actions at law. *Houghton-Mifflin Co. v. Stackpole Sons*, 31 F. Supp. 517. In granting the summary judgment in this case, the district court did not violate Rule 56, Rules of Civil Procedure, since this rule does not make it mandatory that affidavits be filed, *Fletcher v. Evening Star Newspaper Co.*, 133 F. (2) 395, and since findings of fact and conclusions of law are not required, *Lindsey v. Leavy*, 149 F. (2) 899, 902, cert. denied 326 U. S. 783. The only matter to be considered on this appeal is whether on the basis of the record in this case there is any genuine issue as to any material fact and whether appellee is, as a matter of law, entitled to judgment. Cf. *Keehn v. Brady Transfer & Storage Co.*, 159 F. (2) 383, 385.

II.

The record fully satisfies the requirements for a summary judgment that there be no genuine issue as to any material fact and that appellee be entitled to judgment as a matter of law.

A. The only facts alleged in the complaint, as distinguished from legal conclusions, upon which appellant bases its claim of invalidity of Chapter 66, Session Laws of Alaska, 1949, have already been considered and disposed of in the case of *Anderson v. Mullaney*, District Court for Alaska, First Division, No. 6102-A, decided March 21, 1950, where the same district court found Chapter 66 to be valid. The rule of "stare decisis" or "precedent" is then applicable and there was no abuse of discretion in the district court's refusal to consider these same issues again in this case. See 14 *Am. Jur., Courts*, §§59-61, p. 283; *Zinsser et al, v. Krueger*, 45 Fed. 572, 574-575.

B. The majority of the questions of law raised by appellant have been disposed of in the *Anderson* case, *supra*. Hence the district court did not abuse its discretion in refusing to hear arguments that Chapter 66 is invalid on the ground that it was passed in violation of Section 9 of the Organic Act (Act of Aug. 24, 1912, c. 387, § 9, 37 Stat. 514, 48 USCA §77 *et seq.*), the Fourteenth Amendment to the United States Constitution and the Civil Rights Act (Act of May 31, 1870, c. 114, §16, 116 Stat. 144, 8 USCA §41), or that it "makes an unlawful distinction between residents and nonresidents and wrongfully defines a nonresident" (R. 4).

C. With respect to the other legal issues raised by appellant, it is clear that as a matter of law appellee is entitled to judgment. Section 3 of the Alaska Organic Act (Act of Aug. 24, 1912, c. 387, §3, 37 Stat. 512, 48 USCA §24) has not been violated since Chap-

ter 66 is a revenue measure and not a fish law. Cf. *Alaska Fish Co. v. Smith*, 255 U. S. 44, 49. The constitutional questions involved in a consideration of whether Section 5 of Chapter 66, imposing criminal penalties on one who either purchases fish from or employs fishermen not licensed under the Act, should not be considered here for two reason: (1) because it is not plainly disclosed from an examination of the record that this was a genuine issue in the trial court, Cf. *Ring Engineering Co. v. Otis Elevator Co.*, 179 F. (2) 812, and (2) because this is not a case involving this particular portion of Chapter 66 as applied to appellant since appellant is not here being prosecuted under Section 5 of that Act. See *Watson v. Buck*, 313 U. S. 387, 402. Finally, there has been no violation of Section 8 of the Alaska Organic Act (Act of Aug. 24, 1912, c. 387, §8, 37 Stat. 514, 48 USCA §76). All of the provisions of Chapter 66 are so naturally connected to each other as to constitute one "subject," that "subject" is expressed in the title of this Act, and there is nothing else in the title which can be said to thwart the purpose and intent of Section 8, which is to "prevent the inclusion of incongruous and unrelated matters and to guard against inadvertence, stealth and fraud in legislation . . ." *Posados v. Warner B. & Co.*, 279 U. S. 340, 344.

III.

In this case there is no genuine issue as to any material fact and appellee is entitled to judgment as a matter of law because even if the well pleaded facts

in appellant's complaint are taken as true, this action would still have to be dismissed since it is not one for the peculiar type of relief that a court of equity is competent to give. Appellant bases its claim of irreparable injury on certain alleged threats of criminal prosecution, but such assertions are not sufficient to show the "exceptional circumstances and danger of irreparable loss—both great and immediate" essential to justify the interposition of a court of equity. If and when a criminal prosceution is commenced against appellant, there will then be afforded sufficient opportunity for assertion of appellant's claim as to the invalidity of certain provisions of Chapter 66. *Spielman Motor Co. v. Dodge*, 295 U. S. 89, 95-97; *Watson v. Buck*, 313 U. S. 387, 399-401; *Douglas v. Jeannette*, 319 U. S. 157, 162-164.

ARGUMENT

I.

THE SUMMARY JUDGMENT WAS PROPERLY GRANTED AND NOT ENTERED CONTRARY TO THE RULES OF CIVIL PROCEDURE.

There being sufficient grounds to support the summary judgment as is pointed out below, such judgment is not invalid or contrary to any of the rules of civil procedure because findings of fact and conclusions of law were not made. Rule 52(a) expressly provides that "findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule

41(b)." Rule 41(b) does provide for such findings in the event the defendant succeeds in his motion to dismiss and the court renders judgment on the merits against plaintiff, but only in those cases where plaintiff has completed presentation of his evidence at the trial and has closed his case. No trial has been had here and plaintiff has presented no evidence, consequently the dismissal of appellant's complaint in the judgment appealed from here is not the type of involuntary dismissal contemplated by this rule. Findings of fact and conclusion of law, therefore, are not required on a decision of a motion for summary judgment. *Lindsey v. Leavy*, 149 F. (2) 899, 902, cert. denied, 326 U. S. 783; *Filson v. Fountain*, 171 F. (2) 999, 1001, reversed on other grounds, 336 U. S. 681.

Nor was the summary judgment improperly granted because appellee filed no affidavits with his motion or because this action is one for a permanent injunction. Rule 56 does not make it mandatory that affidavits be supplied, *Fletcher v. Evening Star Newspaper Co.*, 133 F. (2) 395, and makes no distinction as to the character or kind of judgment which can be rendered. *Houghton-Mifflin Co. v. Stackpole Sons*, 31 F. Supp. 517. There is only one thing to be considered on this appeal; that is, whether on the record of this case there is any genuine issue as to any material fact, and whether as a matter of law appellee is entitled to judgment and an order dismissing appellant's complaint. Cf. *Keehn v. Brady Transfer & Storage Co.*, 159 F. (2) 383, 385.

II.

THE RECORD FULLY SATISFIES THE REQUIREMENTS OF A SUMMARY JUDGMENT THAT THERE BE NO GENUINE ISSUE AS TO ANY MATERIAL FACT AND THAT APPELLEE BE ENTITLED TO JUDGMENT AS A MATTER OF LAW.

A. The issues of fact involved here have already been adjudicated in the case of ANDERSON v. MULLANEY.

An examination of the complaint (R. 2-15) shows that the only facts alleged, as distinguished from legal conclusions, upon which appellant bases its claim of invalidity of Chapter 66, Session Laws of Alaska, 1949, are those contained in Paragraph VI (R. 4-5) which attempt to show that there is no basis for the classification between resident and nonresident fishermen in the matter of fishing licenses. Therefore, although appellant asserts various reasons why the statute should be declared invalid (Paragraph V) (R. 4), the issue of fact presented by the complaint and answer relates to only one of those grounds; that is, that the statute contains an invalid classification between resident and nonresident fishermen in the matter of the differences in the amount of license tax for each class and thus violates Section 9 of the Organic Act of Alaska (Act of Aug. 24, 1912, c. 387, §9, 37 Stat. 514, 48 USCA §77 *et seq.*), the Fifth and Fourteenth Amendments to the United States Constitution, and the Civil Rights Act (Act of May 31, 1870, c. 114, §16, 116 Stat. 144, 8 USCA §41) (R. 4). This identical issue, however, was expressly raised, considered and decided in the case of *Anderson v. Mull-*

aney, District Court of Alaska, First Division, No. 6102-A, decided March 21, 1950. The district court in that case decided that Chapter 66 was entirely valid as against the contention that the classification between resident and nonresident fishermen was unreasonable and invalid. In that case there was necessity for a decision on this issue, there was sufficient citation of authorities, and the court gave clear and complete reasons for its conclusions. There is then no longer any genuine issue as to any material fact related to the validity of Chapter 66. The rule of "stare decisis" or "precedent" applies and must be adhered to in order to achieve uniformity, certainty and stability in the law. See 14 *Am. Jur.*, *Courts*, §§59-61, pp. 283-284; *Zinsser et al v. Krueger*, 45 F. 572, 574-575; *Siebert v. U.S. Ex Rel Harshman*, 129 U. S. 192; *Lusk v. Botkin*, 240 U. S. 236, 239; *Cox v. Wood*, 247 U. S. 3, 5-6.

It is not necessary, therefore, to take issue with appellant as to what will justify the classification in Chapter 66 between resident and nonresident fishermen. It may well be, as appellant states, that the latest decision of the United States Supreme Court as to whether the State of South Carolina could impose a $2500.00 fee on nonresident fishermen and only a $25.00 fee on resident fishermen, is found in the case of *Toomer v. Witsell*, 334 U. S. 385 (Appellant's Brief, p. 18), but the latest decision on the question of whether Chapter 66, Session Laws of Alaska, 1949, contains a valid classification with respect to fishermen in the Territory of Alaska is contained not in *Toomer v. Witsell*, but in *Anderson v. Mullaney*. The

district court in the latter case having found that there was sufficient proof of increased administrative cost and burden imposed by reason of collecting the license tax from nonresident fishermen to fully justify the imposition of a higher tax on this class, there was, therefore, no abuse of that court's discretion in granting the summary judgment to take judicial notice of its own records in that case, *Fletcher v. Evening Star Newspaper Co.*, 133 F. (2) 395, and to say, in effect, that it meant what it said in the *Anderson* case.

B. The majority of the questions of law raised here have been disposed of in the ANDERSON case.

With exceptions that will be discussed later, the legal issues presented here have already been disposed of in the case of *Anderson v. Mullaney, supra.* Appellant's allegations that Chapter 66 is invalid because it imposes a higher tax on nonresidents than on residents; that it was passed in violation of Section 9 of the Organic Act, in violation of the Fourteenth Amendment to the United States Constitution and in violation of the Civil Rights Act, all of which assertions are apparently based upon the classification in the statute between resident and nonresident fishermen, have been sufficiently and completely disposed of by the district court in its opinion in the *Anderson* case. The further assertion that Chapter 66 "makes an unlawful distinction between residents and nonresidents and wrongfully defines a nonresident," (R. 4), and is for that reason invalid, should not be argued here. This contention, although not expressly considered in the *Anderson* case, was in fact disposed of there by what

the court said with relation to the classification between residents and nonresidents, for if such classification may be based not only upon administrative convenience and expense in collection of the tax, but also upon the "encouragement of settlement and preferment of local enterprise," *Anderson v. Mullaney, supra,* then the definitions of "resident" and "nonresident in Chapter 66 and the resulting distinction between the two are entirely reasonable and proper because rationally related to the object of the classification itself. It was certainly a rational assumption on the part of the territorial legislature that a fisherman "who has not resided in Alaska for the 12 months immediately preceding application for license or who maintains his principal business or place of abode outside the Territory," Chapter 66, Session Laws of Alaska, 1949, §2, is one who, in view of the evidence in the *Anderson* case, would logically cause additional inconvenience and expense in the collection of the tax and one who would be of little assistance in the settlement and development of the Territory. At the very least, this distinction between resident and nonresident fishermen does not show any attempt to oppressively and arbitrarily discriminate against the latter class—something that would have to appear before the statute could be avoided on constitutional grounds of inequality. *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, 255; *Madden v. Ky.*, 309 U. S. 83, 88. The prescribing of residence requirements being a necessary adjunct of the power to classify, the legislature should have considerable freedom in this respect. See *Madden v. Ky., supra,* p. 88.

C. As to the other legal issues relating to the validity of Chapter 66, Session Laws of Alaska, 1949, it is clear that appellee is, as a matter of law, entitled to judgment.

Appellant contends that Chapter 66 is invalid because it was passed "in violation of Section 3, Page 50, Volume 1, Alaska Compiled Laws, 1949," (R. 4) apparently on the theory that the tax constitutes an alteration, amendment, modification or repeal of the "fish. . . .laws. . . .of the United States applicable to Alaska." (Act of Aug. 24, 1912, c. 387, §3, 37 Stat. 512, 48 USCA §24). To such allegation it is sufficient answer that Chapter 66 is a revenue measure and not a fish law, Cf. *Alaska Fish Co. v. Smith,* 255 U. S. 44, 49, and that it has been settled that the Territory, under the Organic Act, has the express power to impose such a license tax as this. *Haavick v. Alaska Packers Assn.,* 263 U. S. 510; *Anderson v. Smith,* 71 F.(2) 493.

Appellant in its brief contends that its complaint "raises the issue that appellant cannot be punished criminally for having in its employ nonresident fishermen who have not paid the tax or for purchasing fish from nonresident fishermen who have not paid the tax. . . ." (Appellant's Brief, p. 16). This contention has no merit for two reasons: (1) It is not at all clear from an examination of the complaint that this was an issue that appellant intended to rely upon, there being no allegation in the complaint that Chapter 66 is invalid because of such provisions, and, therefore, since such issue is not plainly disclosed as a genuine issue in the trial court, appellant should not be allowed to rely upon it here. Cf. *Ring*

Engineering Co. v. Otis Elevator Co., 179 F. (2) 812; *Booth v. State Farm Auto Ins. Co.*, 138 F. (2) 844, 846. (2) Even if it appears that appellant actually relied upon this issue as a ground upon which it based its attack on the validity of Chapter 66, it need not and should not be decided in a case like this where a permanent injunction is sought. There is no allegation in the complaint showing that appellant has been prosecuted under the penal provisions of Chapter 66 for a violation of the provisions of Section 5 of that Act, and at the time of argument on appellee's motion for summary judgment, appellant made no showing by affidavits, as it could have done under Rule 56(c), that any such prosecutions were commenced during the eleven months that elapsed between the date of filing the complaint and the time the summary judgment was granted. There will be sufficient opportunity for appellant to raise the question as to the validity of Section 5 of Chapter 66 at a time when a prosecution under that section is actually commenced. A decision on the constitutional questions involved there should await a case involving this particular provision of the Act as specifically applied to one who is actually being prosecuted. *Watson v. Buck*, 313 U. S. 387, 402; *Ashwander v. Tenn. Valley Authority*, 297 U. S. 288, 346-348.

Finally, it is appellant's contention that Chapter 66 is invalid because passed in violation of that part of Section 8 of the Alaska Organic Act which provides that "no law shall embrace more than one subject, which shall be expressed in its title." (Act of Aug. 24, 1912, c. 387, §8, 37 Stat. 514, 48 USCA §76.) (See

Appellant's Brief, pp. 25-31.) In this connection it is first of all significant to note that no allegation of this sort was contained in the original complaint which was filed on August 5, 1949 (R. 2-15), but was added by amendment on June 30, 1950, (R.4) which was approximately seven weeks after appellee had filed his motion for judgment on the pleadings (R. 37). It is also significant that at the time this amendment was allowed, appellant did not claim that it was not aware at the time the complaint was filed or during the succeeding eleven months that Chapter 66 might possibly have been passed in violation of Section 8 of the Organic Act. This belated amendment, therefore, appears to have been a shifting of ground and an attempt to try a new theory of recovery. The liberality in granting amendments under Rule 15, Rules of Civil Procedure, certainly should not be extended to allow a losing party, seeing that a case is going against him, the privilege of keeping a case in court indefinitely by trying one theory of recovery after another in the hope of eventually hitting upon a successful one. *Hart v. Knox Co.*, 79 F. Supp. 654, 658; *Apex Smelting Co. v. Burns*, 175 F.(2) 978, 981. This amendment, therefore, should not have been allowed, and it should not be necessary then to consider the question of law involved therein.

Assuming, however, that appellee cannot here raise any objections to the allowance of such amendment, it is clear that Section 8 of the Organic Act has not been violated. Appellant argues that there has been such a violation in three particulars: (1) That Chapter 66 embraces more than one subject because it repeals,

among other things, §39-4-1 Alaska Compiled Laws Annotated, 1949, which section deals in part with the rights of aliens to fish in territorial waters; (2) that the provisions of the Act are extended beyond the title in that "fishermen" are defined to include trap watchmen and crews of tenders and other floating equipment used in the handling of fish, who appellant maintains are not "fishermen" and not even remotely connected with "fishermen" or "fisheries"; and (3) that the title of Chapter 66 is defective in attempting to repeal certain sections of the 1949 Alaska Compiled Laws Annotated, and that since this compilation was adopted by the extraordinary session of the 1949 territorial legislature, which session the district court, in the case of *Alaska Steamship Co. v. Mullaney*, 84 F. Supp. 561, has held to be illegally called, this attempt to repeal any part of the 1949 compilation was an attempt to repeal nothing.

The answers to the above arguments are as follows:

(1) What appellant is really doing in its first argument is making a collateral attack on Chapter 30, Session Laws of Alaska, 1933, the Act which was repealed by Chapter 66, Session Laws of Alaska, 1949 on the theory that since Section 1 of said Chapter 30 makes it unlawful for any person not a citizen of the United States to engage in fishing in the Territory of Alaska, this law embraces more than one subject and is, therefore, in violation of Section 8 of the Organic Act. Suffice it to state that the validity of Chapter 30, Session Laws of Alaska, 1933, is not in issue here.

Chapter 66, Session Laws of Alaska, 1949, is the Act under consideration, and since the title of this Act not only refers to the title of the former Act on the same subject, but also contains a sufficient description of the subject contained in Chapter 66, its validity is not affected by the fact that it proposes in its title to repeal and re-enact, and does repeal and re-enact, the subject of a previous Act, the title of which may have been defective. *Mt. Vernon-Woodberry Co. v. Frankfort Ins. Co.*, 111 Md. 561, 75 Atl. 105, 108.

(2) With respect to appellant's second argument, it is important to note the purpose of the provision such as is contained in Section 8 of the Alaska Organic Act. The objective of such a law is, as was stated by the United States Supreme Court in the case of *Posados v. Warner B. & Co.*, 279 U. S. 340, 344:

> ". . . .to prevent the inclusion of incongruous and unrelated matters and to guard against inadvertence, stealth and fraud in legislation. . .the courts disregard mere verbal inaccuracies, resolve doubts in favor of validity and hold that, in order to warrant the setting aside of enactments for failure to comply with this rule, the violation must be substantial and plain."

There is no "substantial and plain" violation here. If the legislature has the power to license fishermen, it is a necessary adjunct of such power that it have the right to define that term, and since this definition is of the word "fishermen" and not something else, anything contained in such definition is, when compared with other provisions of the Act and with the title

thereof, not diverse and has a natural and rational connection therewith. See *Utah Power & Light Co. v. Pfost*, 286 U. S. 165, 187-188; *Wickersham v. Smith*, 7 Alaska 522, 543-544; *Griffin v. Sheldon*, 11 Alaska 607, 615-616, reversed on other grounds, 174 F.(2) 382. It is not at all relevant to a decision as to a possible violation of Section 8 whether the legislature exceeded its authority or violated some constitutional requirement in including in the definition of the word "fishermen" classes of persons whom appellant contends should not have been included. This is an entirely separate issue, and it is, therefore, sufficient for the purpose of Section 8 of the Organic Act that that the word "fishermen" is defined in Chapter 66. As far as the objection that appellant attempts to raise that crews of tenders and other floating equipment are not actually fishermen and should not be included in the definition of that term in Chapter 66, it is not necessary for a decision in this case to consider such argument. Appellant is not a member of a crew of a tender or other floating equipment used in the handling of fish, and, therefore, there will be sufficient time to answer this argument when a case is brought by one who is a member of such class and claims to be injured by being included as a fisherman. *Watson v. Buck*, 313 U. S. 387, 402; *Ashwander v. Tenn. Valley Authority*, 297 U. S. 288, 347.

(3) Appellant's third argument has little merit. Although the illegality of the extraordinary session of the 1949 territorial legislature, *Alaska Steamship Co. v. Mullaney, supra*, may have caused the adoption of the Alaska Compiled Laws Annotated to be ineffective,

no one can be mislead or deceived as to what the legislature intended in repealing in Chapter 66 certain portions of that compilation, since an examination of those sections indicates the particular session laws of Alaska from which they were copied. The legislative intent to substitute former legislation pertaining to the licensing of fishermen of Alaska by Chapter 66, which deals with the same subject, is obvious to any reasonable person. The possible defect in codification of the Alaska laws cannot reasonably thwart the purpose of Section 8 of the Organic Act which is "to prevent the inclusion of incongruous and unrelated matters and to guard against inadvertence, stealth and fraud in legislation. . . ." *Posados v. Warner B. & Co., supra.*

III.

THE SUMMARY JUDGMENT WAS PROPERLY GRANTED SINCE THIS CASE IS NOT ONE FOR THE PECULIAR TYPE OF RELIEF THAT A COURT OF EQUITY IS COMPETENT TO GIVE.

The district court, on August 17, 1949, denied appellant's application for a preliminary injunction on the ground that this case was "merely an ordinary case of a criminal prosecution which would afford adequate opportunity for the assertion of the rights claimed to have been invaded, and hence insufficient to show irreparable injury." (R. 30) It is true, as appellant remarks in its Statement that no findings of fact as such were made (Appellant's Brief, p. 5), but full compliance with Rule 52(a) of the Rules of Civil Procedure, requiring findings of fact and conclusions of law by a court in refusing an interlocutory injunction, has been had since this rule provides that

if an opinion or memorandum of decision is filed, it is sufficient if the findings of fact and conclusion of law appear therein. The court rendered two memorandum opinions on this point (R. 28-31) and they are entirely sufficient to indicate the factual basis for its ultimate conclusion. See *Kelley v. Everglades District*, 319 U. S. 415, 422.

The district court, in granting the summary judgment dismissing the appellant's complaint, did so on the ground "that there is no issue of fact in view of the lack of power to grant injunctive relief." (R. 38) This is entirely clear and should not be confusing to appellant. "Lack of power to grant injunctive relief" means only one thing; that is, that this case is not one for the type of relief by way of injunction that an equity court is competent to give. And if reasons for this conclusion of the court are demanded, they are fully set out in its memorandum opinions of August 15 and 16, 1949, (R. 28-31) where the court refused to grant the interlocutory injunction. What the court obviously meant in ruling on the motion for summary judgment was that even taking the facts well pleaded by appellant to be true, *Creedon v. Bowman*, 75 F. Supp. 265, 267, the action would have to be dismissed on the final hearing because the court would not have been able to grant a permanent injunction in a case of this kind. This, therefore, is the type of case where the want of equity is so obvious that even if not objected to by appellee, it would have had to have been objected to by the court on its own motion. See *Matthews v. Rodgers*, 284 U. S. 521, 524.

The rule is well settled that equity will not enjoin the enforcement of a taxing statute on the mere allegations of a complainant that the tax is illegal or burdensome, but that in addition to such allegations there must be a sufficient showing that the case comes under some recognized head of equity jurisdiction such as the lack of an adequate remedy at law or danger of irreparable injury, *State R. R. Tax Cases*, 92 U. S. 575. Especially is this true when the equity powers of a court are invoked to interfere by injunction with threatened criminal prosecutions. *Douglas v. Jeannette*, 319 U. S. 157, 162; *Beal v. Mo. Pac. R. Co.*, 312 U. S. 45, 49; *Spielman Motor Co. v. Dodge*, 295 U. S. 89, 95. Since "no citizen or member of a community is immune from prosecution, in good faith, for his alleged criminal acts," *Beal v. Mo. Pac. R. Co., supra*, p. 49, there is ample opportunity for one who feels aggrieved to raise the question of the lawfulness or constitutionality of a statute upon which a prosecution is based in a criminal case, without resorting to a suit for an injunction. *Douglas v. Jeannette, supra*, p. 163. In order for one to bring a case within the exception to the rule, there must be a clear showing of "exceptional circumstances" and that the "danger of irreparable loss is both great and immediate." *Spielman Motor Co. v. Dodge, supra*, p. 95.

No such showing is made here. The allegations of fact upon which appellant bases its claim of irreparable injury are as follows: (1) That appellee has demanded from appellant payment of the license tax imposed under Chapter 66 on each nonresident fisherman who is an employee of appellant and on each

nonresident fisherman from whom appellant purchases fish, and has threatened to prosecute appellant if such taxes are not paid (R. 5-6, 12); (2) that appellee has threatened to disrupt and destroy appellant's fishing and canning operations and destroy its investment necessary thereto (R. 6); (3) that appellee has threatened to prosecute the employees of appellant who are fishermen for engaging in the business of fishing without a license (R. 5-6); (4) that appellee sent his deputies to Naknek in July 1949 with warrants of arrest (R. 6, 13); (5) and that appellee has threatened to prosecute appellant for employing and purchasing fish from nonresident fishermen who were not licensed (R. 13).

Points (1) and (2) do not sustain appellant's alleged claim of irreparable injury. First of all, appellant is not subject to the taxing provisions of Chapter 66 and there is nothing contained in that Act which requires appellant to pay the tax on nonresident fishermen whether they be employees of appellant or whether they be those from whom appellant purchases fish. Appellant, therefore, not being within the class of persons to whom the taxing provisions of the Act apply, should not be allowed to rely upon such allegations as a basis for the irreparable injury necessary to be shown in order to test the validity of the Act by way of a suit for injunction. Cf. *Heald v. District of Columbia*, 259 U. S. 114, 123; *Ashwander v. Tenn. Valley Authority*, 297 U. S. 288, 347-348. Secondly, it is difficult to imagine just how appellee would proceed to go about disrupting and destroying appellant's fishing and canning operations. Certainly

there is nothing in Chapter 66 which gives appellee such power or authority. A general statement such as this falls short of such a threat as would warrant the interference of a court of equity. Cf. *Watson v. Buck*, 313 U. S. 387, 400.

The remaining allegations then upon which appellant's claim for injury are based may be reduced to this: that appellee has threatened to prosecute the nonresident fishermen employees of appellant for fishing without licenses; has threatened to prosecute appellant for employing and for buying fish from nonresident fishermen who are not licensed, and that appellee's deputies on one occasion went to Naknek with warrants of arrest (although there was nothing said as to whether any arrests were actually made). The district court was entirely correct in stating that this was insufficient to warrant the interposition of a court of equity (R. 29). Appellant's allegations, therefore, are nothing more than a statement that appellee intends to perform his duty, which is not the "equivalent of a threat that prosecutions are to be begun so immediately, in such numbers, and in such manner as to indicate the virtual certainty of that extraordinary injury which alone justifies equitable suspension of proceedings in criminal courts." *Watson v. Buck, supra*, pp. 400-401.

This is then a case where in one criminal prosecution brought against either a fisherman who is not licensed or against appellant for having in its employ, or for purchasing fish from, a fisherman who is not licensed, adequate opportunity would be afforded for

an assertion of appellant's alleged claim that certain provisions of Chapter 66 applicable to appellant are invalid, *Spielman Motor Co. v. Dodge*, *supra*, p. 96, and nothing indicates that more than one such prosecution would be necessary. Cf. *Matthews v. Rodgers*, 284 U. S. 521, 529. There is, then, absolutely no showing of any great and immediate danger of irreparable loss, particularly in view of the fact that under the penal provisions of Chapter 66 there is no provision for seizure and forfeiture of appellant's property or of an ousting of appellant from the fishing grounds in Alaska where it carries on its business, Cf. *Hynes v. Grimes Packing Co.*, 337 U. S. 86, 99; and in view of the fact that at the time of the argument on the motion for summary judgment, appellant did not, although it had adequate opportunity to do so, present any affidavits indicating that between August 5, 1949, and July 29, 1950, it had actually suffered any irreparable loss and had its operations disrupted and business destroyed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the action of the district court in granting the summary judgment for appellee and dismissing the appellant's complaint was proper and that the judgment should, therefore, be affirmed.

Respectfully,

J. GERALD WILLIAMS
Attorney General of Alaska

JOHN H. DIMOND
Assistant Attorney General
Juneau, Alaska
For Appellee.

September 1950

APPENDIX A

Chapter 66, Session Laws of Alaska, 1949

AN ACT

Pertaining to Fisheries; to provide for the licensing of fishermen in the Territory of Alaska; requiring license fees; defining violations and prescribing penalties; repealing Section 39-4-1 to 39-4-16, inclusive except 39-4-11, Alaska Compiled Laws Annotated, 1949; and declaring an emergency.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. For the purposes of this Act, "fisherman" shall mean any person who fishes commercially for, takes or attempts to take salmon, halibut, bottom fish, crabs, clams, or other fishery resources of Alaska, and shall include every individual aboard boats operated for fishing purposes who participates directly or indirectly in the taking of the raw fishery products above mentioned whether such participation be on shares or as an employee or otherwise. The term "fisherman" shall also include trap watchmen or others engaged in operating fish traps as well as the crews of tenders or other floating equipment used in handling of fish.

Section 2. No person shall become engaged as a fisherman as above defined without first obtaining a license so to do. License fees levied upon fishermen are as follows: Resident fisherman, $5.00; non-resident fisherman, $50.00. Such licenses shall run for one calendar year, and expire on December 31st of each year. For the purposes of this Act, a resident

shall be any citizen who has resided in the Territory for 12 months immediately preceding application for such license and shall have been a bona fide inhabitant of Alaska for at least six months during each calendar year thereafter, and who maintains his place of abode in Alaska. A non-resident is a citizen who has not resided in Alaska for the 12 months immediately preceding application for license or who maintains his principal business or place of abode outside of the Territory. Any person not a citizen of the United States is deemed to be an alien unless he possesses a valid declaration of intention to become such citizen.

Section 3. Licenses to fish shall be issued by the Tax Commissioner pursuant to written applications containing such information as may be required by the Tax Commissioner, and such licenses may also be issued by his deputies. Such applications shall be simple in form and be executed by applicants or their respective agents under the penalties of perjury; Provided, however, that representations respecting citizenship shall not apply to one who is a native descendant of one of the aboriginal tribes of Alaska, and who in the application describes himself as such. The Tax Commissioner's regular deputies shall each be supplied with a metal badge with the words "Territorial Tax Collector" engraved thereon and which badge they shall wear plainly exposed when on duty.

Section 4. The Tax Commissioner is hereby authorized to appoint United States Commissioners, cannery or cold storage agents, fish buyers or other persons as his agents to take applications, issue the licenses and

collect license fees hereunder, and with respect to such persons not employed on salary by the Tax Department, the Tax Commissioner is hereby authorized to establish reasonable and uniform rates of compensation for such services on a commission basis for issuance of each resident and non-resident license. The United States Commissioners and other agents shall monthly transmit to the Tax Commissioner all fees collected by them, less their authorized commissions, together with a full account of same. The Tax Commissioner shall not be liable for defalcation or failure to account for the fees so collected by any such agent, but shall require a bond in such sum as he may deem adequate, conditioned upon faithfully accounting for all moneys collected hereunder.

Section 5. It shall be unlawful for any person, association or corporation, or for the agent of any person, or for the officer or agent of any association or corporation, to have in his, their or its employ any fisherman who is not duly licensed under this Act or to purchase fish from any fisherman who is not so licensed. Each buyer of the fish shall keep a record of each purchase showing name of boat from which the catch involved is taken, amount purchased, and the names of all persons attached to the boat who participated in the trip on which the fish or shellfish were taken. Such records may be kept on forms provided by the Tax Commissioner, but must be kept in any event, and each person charged with keeping such records must report same to the Tax Commissioner in accordance with rules and regulations promulgated by him. Anyone violating any of the provisions of this section shall be

guilty of a misdemeanor, and upon conviction, punishable under the penalty clause of this Act.

Section 6. (a) The Tax Commissioner's deputies shall have full power to enforce this Act. Likewise the agents of the Fish and Wildlife Service, Department of the Interior, are hereby fully authorized to enforce this Act. (b) Licenses shall be subject to inspection, and shall, upon request by any officer authorized to enforce this Act, be exhibited to him. Failure to procure or exhibit such license as indicated above or otherwise comply with this Act shall be a misdemeanor, and upon conviction thereof the offender shall be subject to a fine not exceeding $500.00 or imprisonment not to exceed six months, or to both such fine and imprisonment.

Section 7. This Act shall not apply to fishing for personal consumption but shall apply only to fishing for commercial purposes; Provided, however, that with respect to rivers of Alaska wherein commercial fishing is prohibited, fishing by Indians, Eskimos or Aleuts for the purpose of drying fish for sale as dog food, shall not be considered commercial fishing.

Section 8. Section 39-4-1 to 39-4-16, inclusive except 39-4-11, Alaska Compiled Laws Annotated 1949, are hereby repealed.

Section 9. If any provisions of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of the Act and such application

to other persons or circumstances shall not be affected thereby.

Section 10. An emergency is hereby declared to exist and this Act shall take effect immediately upon its passage and approval.

Approved March 21, 1949.

* * *

Act Aug. 24, 1912, c 387, §8, 37 Stat. 514, 48 USCA §76.

The enacting clause of all laws passed by the legislature shall be "Be it enacted by the Legislature of the Territory of Alaska." No law shall embrace more than one subject, which shall be expressed in its title.

APPENDIX B

IN THE DISTRICT COURT
FOR THE TERRITORY OF ALASKA
DIVISION NUMBER ONE AT JUNEAU

OSCAR ANDERSON and
ALASKA FISHERMENS'
UNION,

Plaintiff,

vs.

M. P. MULLANEY.

Defendant.

No. 6102-A
OPINION

Filed March 21,1950

WM. L. PAUL, JR. and R. E. JACKSON, Attorneys for Plaintiffs.

J. GERALD WILLIAMS, Attorney General of Alaska and JOHN H. DIMOND, Assistant Attorney General. for Defendant.

By Chapter 66, SLA, 1949, the Territorial Legislature increased the license taxes on resident fishermen from $1 to $5 and on non-resident fishermen from $25 to $50. The $25 tax, imposed in 1933 when the purchasing power of a dollar was more than double what it now is, was sustained in *Anderson v. Smith*, 71 F.(2) 493.

Plaintiffs seek to restrain the enforcement of this act, so far as it applies to non-resident fishermen, on the grounds that:

(1) It contravenes the 14th amendment in that it discriminates against non-residents;

(2) That it conflicts with the provision of Section 9 of the Organic Act, 37 Stat. 512, 48 USCA 78, requiring uniformity of taxation on the same class of subjects;

(3) That it encroaches on the admiralty jurisdiction thereby substantially affecting its uniformity, and

(4) Burdens interstate commerce in violation of Article 1, Section 8 of the Constitution.

Since the third contention is disposed of adversely to plaintiff by *Alaska Steamship Company v. Mullaney*, decided March 1, 1950, by the Court of Appeals for the 9th Circuit, and *Just v. Chambers*, 312 U. S. 383, 392; and it is well settled that a tax of this kind is not a burden on interstate commerce because the taxable event—the taking of the fish—occurs before the fish have entered the flow of commerce, *Toomer v. Witsell*, 334 U. S. 385, 394, and that the uniformity provision of the Organic Act does not apply to license taxes, *Alaska Fish Saltery & By-Products Co.*, 255 U. S. 44, these contentions will not be discussed.

So far as the remaining contention that the tax violates the 14th amendment is concerned, the question differs in form only from that presented in *Martinsen v. Mullaney*, 85 F. S. 76. In that case this Court held that in the absence of evidence of the existence of a rational basis for classification, the tax of $50 on

non-resident fishermen was invalid under the Civil Rights Act. In the instant case the defendant has introduced evidence showing the earnings of non-resident fishermen and the difficulty and expense of collecting the tax from them, detecting evasions and apprehending violators. Briefly, the evidence shows that thousands of non-residents come to Alaska each year and engage in fishing for salmon during the fishing season, which varies from 20 days in Bristol Bay to 2 months elsewhere, during which time they enjoy the protection of the local government; that among them are hundreds of trollers who come to the Territory in their power boats, roaming far and wide along the 26,000 miles of coastline; and that since they own no property and are not required by the shipping laws to enter or clear upon arrival in or departure from the Territory and, moreover, warn each other by radiophone of the proximity or presence of the tax collector, the difficulties of detection, apprehension and collection during the short fishing season are well nigh insuperable. Moreover, the evidence shows that evasion does not end with apprehension, for often there is a claim of local residence, the verification of which can not be undertaken until the pursuit of evaders ends with the close of the fishing season, when, upon discovery of the falsity of the claim, the violator is invariably out of the jurisdiction of the Territory. It is not surprising, therefore, that the testimony shows that 90 per cent of the cost of collecting the taxes under Chapter 66 is incurred in collecting or attempting to collect the non-resident tax.

The evidence further shows that the net annual earnings of trollers for a season of 4 to 5 months average approximately $3500; of gill netters in Bristol Bay approximately $2500 for a season of 20 days, while the average earnings of those employed on cannery tenders and traps are approximately $1500 and $2000, respectively.

I am of the opinion, therefore, that the classification of fishermen into residents and non-residents rests on substantial differences bearing a fair and reasonable relation to the object of the legislation, within the doctrine of *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415; *Louisville Gas & Electric Co. v. Coleman*, 277 U. S. 32, 37. Indeed, administrative inconvenience and expense in the collection of a tax may themselves afford sufficient basis for such a classification. *Carmichael v. Southern Coal Co.*, 301 U. S. 495, 512; *Madden v. Kentucky*, 309 U. S. 83, 89, 90. Likewise the encouragement of settlement and preferment of local enterprise would appear to be sufficient under *Haavik v. Alaska Packers' Assn.*, 263 U. S. 510, 515; *Welch v. Henry*, 305 U. S. 134, 146; *New York Rapid Transit v. New York*, 303 U. S. 573, 580. And the Court will take judicial notice of the national policy implicit in many recent legislative and administrative measures designed to accomplish these ends.

Accordingly, I conclude that the tax is valid and that the complaint should be dismissed.

GEO. W. FOLTA
District Judge